

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP760

Cir. Ct. No. 2010TR6821

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF MARATHON,

PLAINTIFF-RESPONDENT,

V.

ERIC G. FISCHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County:
JILL N. FALSTAD, Judge. *Reversed and cause remanded for further proceedings.*

¶1 MANGERSON, J.¹ Eric Fischer appeals a judgment of conviction for operating while intoxicated, first offense. Fischer argues the circuit court erred

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

by denying his suppression motion because the officer lacked probable cause to arrest him for operating while intoxicated. We agree, and reverse and remand for further proceedings.

BACKGROUND

¶2 At the suppression hearing, officer Joseph Heindel testified that, on September 12, 2010 at 5:35 p.m., he responded to a motorcycle crash. When he arrived at the scene, Heindel observed a motorcycle in a ditch and emergency medical technicians (EMTs) surrounding a male, subsequently identified as Fischer, who appeared to be injured.

¶3 While EMTs were tending to Fischer, Heindel spoke with Fischer's wife,² who told Heindel that Fischer had been driving the motorcycle. Heindel then spoke briefly with Fischer, who confirmed he had a motorcycle license and the motorcycle belonged to him. Fischer was transported to the hospital, and Heindel followed.

¶4 At the hospital, Fischer told Heindel he was driving and swerved to avoid hitting a turkey. Fischer also told Heindel that, at the time of the accident, he was not wearing a helmet. Heindel testified turkeys are prevalent in the area, and Fischer's explanation for the accident was plausible. Heindel also noticed no indicia of impairment—Fischer was acting appropriately and responding to questions. Heindel concluded his investigation and began to leave the hospital.

² The record is unclear as to whether Fischer's wife was a passenger or simply responded to the scene.

¶5 As Heindel was leaving the hospital, he was approached by an emergency room nurse.³ The nurse advised Heindel that Fischer had admitted to drinking. Heindel conceded he did not know the nurse's identity, what her role was in the emergency room, or how she had obtained her information.

¶6 Heindel, however, returned to Fischer and asked him if he had been consuming alcohol. Fischer told Heindel he had "two beers with lunch." Heindel stated that, at that time, Fischer was wearing an oxygen mask and Heindel noticed a "slight odor of an intoxicating beverage" emitting from Heindel's person. With the help of the attending emergency room nurse, Heindel administered a preliminary breath test.

¶7 Heindel stated Fischer gave an adequate breath sample because, when Fischer blew into the preliminary breath test machine, the light on the machine illuminated, indicating an adequate breath sample. The result of the preliminary breath test was a .06. Heindel stated the result was within the legal limit and Fischer demonstrated no other signs of intoxication.⁴

¶8 Based on the preliminary breath test result, Heindel determined he did not have probable cause to arrest Fischer for operating while intoxicated. Heindel again prepared to leave the hospital "so that [Fischer] could continue to be tended by E.R. staff." As he started to leave, Heindel was approached by the nurse who previously advised him that Fischer admitted to drinking. She asked

³ Although the unknown woman is referred to as a nurse, the record does not reflect how that determination was made or whether she truly was a nurse.

⁴ Heindel explained he could not administer field sobriety tests because Fischer "was on a backboard, he had a cervical collar on, and it was impossible for me to appropriately or adequately ask him to perform those tests. He was totally immobilized."

Heindel about Fischer's preliminary breath test, and, after Heindel advised her of the result, the nurse told Heindel, "they had obtained a blood sample and it was a 0.15 percent." Heindel returned to Fischer and arrested him for operating while intoxicated.

¶9 Heindel conceded he did not see any document indicating the hospital's alleged test result, he did not know how the nurse obtained her information, and the nurse never advised Heindel that her information was based on her personal knowledge. Heindel also conceded he was aware that hospitals sometimes calculate an individual's blood alcohol concentration using the weight of blood instead of the volume of blood⁵ and he did not know how the .15% result was calculated. Finally, he stated neither the nurse nor any of the attending medical personnel told him Fischer was impaired.

¶10 The circuit court concluded Heindel had probable cause to arrest Fischer based on the totality of the circumstances. It reached this conclusion based on the crash, Fischer's admission of consuming alcohol, the odor of intoxicants emanating from Fischer's person, and the hospital's .15% blood test result. The court stated Heindel reasonably relied on the .15% test result to support his probable cause determination because the nurse who provided this information had previously given Heindel information that proved to be true—specifically that Fischer had admitted to drinking. The court also stated that, although Fischer gave an appropriate breath sample and his preliminary breath test result was a .06, it was reasonable for Heindel to conclude the hospital's blood test

⁵ The Wisconsin State Laboratory of Hygiene calculates a person's blood alcohol concentration as the number of grams of alcohol per 100 milliliters of a person's blood. *See* WIS. STAT. § 340.01(1v)(a).

was more accurate than his preliminary breath test. The court denied Fischer's suppression motion. Fischer subsequently pleaded no contest, and the circuit court found him guilty.

DISCUSSION

¶11 Fischer argues the circuit court erred by denying his suppression motion because Heindel did not have probable cause to arrest him for operating while intoxicated. When reviewing a circuit court's denial of a motion to suppress evidence, we accept the circuit court's findings of fact unless they are clearly erroneous. *State v. Drew*, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404. However, application of constitutional principles to those facts presents a question of law, which we review independently. *Id.*

¶12 To determine whether probable cause to arrest exists, we look at the totality of the circumstances to determine whether the "arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe ... that the defendant was operating a motor vehicle while under the influence of an intoxicant." *State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). Probable cause to arrest does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." *State v. Popke*, 2009 WI 37, ¶14, 317 Wis. 2d 118, 765 N.W.2d 569. Rather, "probable cause requires that 'the information lead a reasonable officer to believe that guilt is more than a possibility.'" *Id.* (citation omitted). "In other words, probable cause exists when the officer has 'reasonable grounds to believe that the person is committing or has committed a crime.'" *Id.* (citation omitted).

¶13 This case turns on whether the .15 blood test result can be considered in the probable cause analysis. If we exclude the .15 blood test result

from the probable cause determination, we conclude that, based on the totality of the circumstances, Heindel did not have probable cause to reasonably believe Fischer operated his motorcycle while impaired. See *Popke*, 317 Wis. 2d 118, ¶14. Specifically, without the .15 blood test result, at the moment of arrest, Heindel knew Fischer drove his motorcycle into a ditch, exhibited no mannerisms indicative of impairment, was responding appropriately to Heindel's questions, admitted to consuming two beers with lunch, smelled slightly of intoxicants, gave a plausible explanation for the accident, and had a preliminary breath test result of .06. Based solely on these facts, especially the preliminary breath test result—used expressly by officers to determine probable cause—we conclude that Heindel did not have information that would lead him to reasonably believe Fischer was operating while intoxicated.

¶14 On the other hand, if the .15 blood test result is included in the probable cause analysis, we agree with the State that, “[a]t almost double the legal limit, the blood result alone gave deputy Heindel probable cause for an OWI arrest.” Therefore, we focus our analysis on whether Heindel could properly rely on the blood test result in his probable cause determination.

¶15 Fischer first argues the blood test result cannot be included in the probable cause determination because Heindel failed to engage in further investigation before arresting him based on the nurse's information. Fischer notes that moments before he was arrested, Heindel had just concluded, based on the .06 preliminary breath test result, that he did not have probable cause to arrest Fischer for operating while intoxicated. Fischer emphasizes that Heindel simply disregarded the preliminary breath test result and relied on an unknown nurse's alleged test result without any independent investigation. He explains Heindel did not know how the nurse obtained her information, did not know how the hospital

calculated Fischer’s alleged blood alcohol concentration, never saw any purported test result, and was never advised that Fischer was impaired.

¶16 The State responds Heindel properly relied on the blood test result provided by the nurse because she had previously given reliable information—specifically, that Fischer had admitted to consuming alcohol. The State emphasizes this information was corroborated by Heindel before he arrested Fischer. The State also contends Heindel could reasonably conclude that, when determining whether Fischer was impaired, a hospital blood test result was more accurate than a preliminary breath test result.

¶17 Whether information from a tip provides a police officer with probable cause to arrest depends on a “totality of the circumstances” analysis. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). An officer must consider the reliability and content of the tip. *State v. Rutzinski*, 2001 WI 22, ¶17, 241 Wis. 2d 729, 623 N.W.2d 516. “In assessing the reliability of a tip, due weight must be given to: (1) the informant’s veracity; and (2) the informant’s basis of knowledge.” *Id.*, ¶18. However, probable cause to arrest based on a tip requires more detailed and more reliable information than, for example, reasonable suspicion to conduct an investigatory stop based on a tip. *See Alabama v. White*, 496 U.S. 325, 330 (1990).

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Id.

¶18 Here, the nurse previously provided information to Heindel that proved to be reliable—specifically, that Fischer admitted to consuming alcohol—and Heindel independently corroborated that fact. This indicates some degree of veracity. However, the nurse provided no basis for her knowledge that Fischer’s blood alcohol content was .15%. At the suppression hearing, Heindel conceded he did not know what the nurse’s role was in the emergency room or how she came to know Fischer’s purported blood test result. As for the contents of the tip at issue, Heindel did not know the metrics used by the hospital when it calculated the blood test result and no one advised him that the result indicated impairment. Accordingly, we conclude that, even with the nurse’s assumed veracity, the lack of an established basis of knowledge combined with the tip’s lack of detail does not, by itself, establish sufficient indicia of reliability such that the tip, by itself, could be included in the probable cause determination. “Something more” than the tip was required. *See Gates*, 462 U.S. at 227-28 (Police must supplement a tip lacking sufficient indicia of reliability with information sufficient to permit a determination of probable cause.).

¶19 Further, and more problematic, Heindel had actual information—in the form of the preliminary breath test result he conducted—that indicated Fischer was not impaired. Yet, without conducting any sort of investigation, such as inquiring how the nurse obtained her information, confirming the test result indicated impairment, or even asking to view the test result, Heindel simply abandoned his own investigative work and determined the unknown nurse’s information was more reliable and accurate than the test he actually performed. Stated another way, Heindel chose rank hearsay over the report of an instrument that is designed to give him an indication of impairment, that he operates himself, and that he relies on daily. Although we agree with the State that a blood test

result can be more accurate than a preliminary breath test result, in this case, Heindel needed something more before he discarded his own investigative work in favor of information from an unknown nurse without an established basis of knowledge.

¶20 Accordingly, we conclude the nurse's information about the .15 blood test result should not have been included in the probable cause determination. Because we have previously determined that, without the blood test result, Heindel lacked probable cause to arrest Fischer for operating while intoxicated, we reverse and remand for further proceedings consistent with this opinion.⁶

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁶ Because we conclude the blood test result, without more, could not be included in the probable cause determination, we need not consider Fischer's alternative argument that the blood test result could not be included in the probable cause determination because the test result was privileged. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (“[C]ases should be decided on the narrowest possible ground.”).

